Director General of Inland Revenue v Siong Hoe Biscuit & Confectionary Factory Sdn Bhd

HIGH COURT (MALACCA) — TAX APPEAL NO 14–2 OF 1986
RICHARD TALALLA J
23 SEPTEMBER 1991

Revenue Law *— Income tax — Additional assessment — Appeal to High Court by way of case stated — Special commissioners' decision regarding admissibility of evidence at interlocutory stage — Whether such decision is a 'deciding order' which is appealable to High Court — Income Tax Act 1967 paras 23 and 34 of Sch 5*

An additional assessment for a 14-year period was made by the appellant against the respondent on the ground of fraud or wilful default on the latter's part. The respondent appealed to the special commissioners against the assessment in the course of which the appellant sought to tender as evidence the returns and assessments for two years of assessment which were outside the period of dispute. The respondent objected to the admissibility of these returns and assessments. The special commissioners upheld the respondent's objection and ruled such evidence to be inadmissible. The appellant gave notice of intention to appeal against this decision and the commissioners referred the matter to the High Court by way of case stated for an opinion as to whether on the facts their ruling was correct in law. The respondent raised a preliminary objection that it was not competent for the commissioners to refer the matter to the High Court by way of case stated because firstly, the appellant's appeal was not against a deciding order made by the commissioners and secondly, the respondent's appeal before the special commissioners was still pending. The appellant argued that the order made by the special commissioners was a 'deciding order' notwithstanding that it was made at an interlocutory stage. The appellant then submitted that the High Court should grant the appellant relief by way of judicial review.

Held, dismissing the appeal:

(1) Under para 34 of Sch 5 to the Income Tax Act 1967 ('the Act'), a party who is dissatisfied with an order made by the special commissioners can only require them to state a case for the opinion of the High Court in the event of the commissioners making a 'deciding order' and not before. According to para 23 of Sch 5 to the Act, a 'deciding order' can only be made after the special commissioners have completed the hearing of an appeal. The object of limiting appeal by way of case stated to that against a deciding order may well be to ensure that the High Court is not inundated with applications such as in this case.

(2) The decision of the special commissioners in this case was not a 'deciding order' and was not therefore appealable to the High Court by way of case stated. The appellant should have awaited

the completion of the hearing of the appeal by the special commissioners and their 'deciding order' as statutorily defined and then if dissatisfied with that order proceed by requiring the special commissioners to state a case for the opinion of the High Court.

(3) There was no proper application for judicial review. Moreover judicial review should not ordinarily be granted where an alternative remedy is available by way of appeal procedures expressly provided by tax legislation.

[Bahasa Malaysia summary

Satu taksiran tambahan untuk masa 14 tahun telah dibuat oleh perayu terhadap penentang atas alasan fraud atau keingkaran sengaja pada bahagian penentang. Penentang telah memohon kepada pesuruhjaya khas terhadap taksiran itu dalam proses yang mana perayu cuba mengemukakan sebagai keterangan penyata dan taksiran untuk dua tahun taksiran yang terkeluar daripada masa pertikaian. Penentang membantah kebolehterimaan penyata dan taksiran tersebut. Pesuruhjaya khas telah membenarkan bantahan penentang dan mengarah keterangan tersebut tidak boleh diterima. Perayu telah memberi notis niat beliau untuk membuat rayuan terhadap keputusan ini dan pesuruhjaya telah merujuk perkara itu kepada Mahkamah Tinggi melalui hal yang disebutkan (case stated) untuk satu pendapat sama ada pada fakta kes ini arahan mereka adalah betul menurut undang-undang. Penentang menimbulkan satu bantahan permulaan bahawa pesuruhjaya tidak kompeten untuk merujuk perkara itu kepada Mahkamah Tinggi melalui hal yang disebutkan kerana pada pertamanya rayuan perayu bukan terhadap perintah yang tetap (deciding order) yang dibuat oleh pesuruhjaya dan pada keduanya, rayuan penentang di hadapan pesuruhjaya khas masih belum diputuskan. Perayu berhujah bahawa perintah yang dibuat oleh pesuruhjaya khas adalah suatu perintah yang tetap walaupun ia telah dibuat pada peringkat interlokutori. Perayu kemudian berhujah bahawa Mahkamah Tinggi patut memberi perayu relief melalui kajian semula kehakiman.

Diputuskan, menolak rayuan itu:

(1) Di bawah fasal 34 Jadual 5 Akta Cukai Pendapatan 1967 ('Akta itu'), sesebuah pihak yang tidak puas hati dengan perintah yang dibuat oleh pesuruhjaya khas hanya boleh mendesak mereka untuk menyebutkan satu hal untuk pendapat Mahkamah Tinggi sekiranya pesuruhjaya membuat perintah yang tetap dan bukan sebelumnya. Mengikut fasal 23 Jadual 5 Akta itu, satu perintah yang tetap hanya boleh dibuat selepas pesuruhjaya khas menyelesaikan pembicaraan suatu rayuan. Objek menghadkan rayuan melalui hal yang disebutkan kepada yang terhadap satu perintah yang tetap mungkin sekali ialah untuk memastikan bahawa Mahkamah Tinggi tidak dibanjiri dengan permohonan seperti yang dalam kes ini.

(2) Keputusan pesuruhjaya khas dalam kes ini bukanlah satu perintah yang tetap dan oleh kerana itu tidak dapat dirayukan kepada

Mahkamah Tinggi melalui hal yang disebutkan. Perayu sepatutnya menunggu penyelesaian pembicaraan rayuan oleh pesuruhjaya khas dan perintah yang tetap mereka sebagaimana ia ditakrifkan dalam statut dan jika tidak berpuas hati dengan perintah itu bertindak dengan mendesak pesuruhjaya khas untuk menyebutkan hal untuk pendapat Mahkamah Tinggi.

(3) Tidak ada permohonan yang wajar untuk kajian semula kehakiman. Lebih daripada itu, kajian semula kehakiman seharusnya tidak biasanya diberi di mana remedi alternatif boleh didapati melalui prosedur rayuan yang ternyata diperuntukkan oleh perundangan cukai.]

Cases referred to

1 *R v Brentford General Commissioners, ex p Chan et al* 57 TC 651 (distd)
2 *Bye v Coren & Anor* (1986) 130 SJ 542 (distd)
3 *Samuel Bruce v Burton* 4 TC 399 (refd)
4 *Furtado v The City of London Brewery Co Ltd* 6 TC 382 (refd)
5 *PP v Chia Kim Chwee, Raymond & Anor* and *Zainal bin Haji Ali v PP* [1985] 2 MLJ 436 (distd)
6 *PP v Hoo Chang Chwen* [1962] MLJ 284 (refd)
7 *PP v RK Menon & Anor* [1978] 2 MLJ 152 (distd)
8 *Trustees' Corp (India) Ltd v The Commissioners of Income Tax, Bombay Presidency* AIR 1930 PC 151 (folld)
9 *R v Inland Revenue Commissioners, ex p Preston* [1985] AC 835; [1985] 2 WLR 836; [1985] 2 All ER 327 (folld)

Legislation referred to

Income Tax Act 1967 ss 91(1), (3), 102(4), paras 22, 23, 34, 39, 45(a), 48 of Sch 5
Income Tax Act 1922 [Ind] s 66(2)
Income Tax Act 1842 [GB] s 134
Taxes Management Act 1970 [UK] s 56(6)

Mohamed Bazain bin Idris (Senior Federal Counsel, Inland Revenue Department) for the appellant.

AC Vohrah and *CV Das* (*Vohrah & Tan Chee Lan*) for the respondent.

Richard Talalla J: The appellant raised against the respondent additional assessment of income tax for the years 1964 to 1978 inclusive. Because there was a 14-year period involved it went outside the 12-year limitation period stipulated in s 91(1) of the Income Tax Act 1967 ('the Act'). The appellant claimed to be entitled to raise additional assessment for the whole 14 years by reference to s 91(3) of the Act as it was intended to prove fraud or wilful default on the part of the respondent. Section 91(1) and (3) of the Act read as follows:

(1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an

assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

(3) The Director General where it appears to him that —

(a) any form of fraud or wilful default has been committed by or on behalf of any person; or
(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

The appellant had raised the additional assessment for the 14 years. The respondent being aggrieved by the same appealed to the special commissioners against that assessment. In the course of the hearing of the appeal the appellant sought to prove fraud and wilful default on the part of the respondent by tendering the returns and assessments for the years of assessment 1979 and 1980 which were outside the period of dispute. The respondent's representative objected to the tendering of those returns and assessments, claiming them to be inadmissible in evidence. The commissioners upheld the objection. The appellant gave notice of intention to appeal against the decision of the commissioners ruling the evidence to be inadmissible. The commissioners, purporting to act under paras 22 and 45(a) of Sch 5 of the Act and considering themselves supported by the case of *R v Brentford General Commissioners, ex p Chan et al*[1] and *Bye v Coren & Anor*,[2] referred the matter to this court by way of case stated for an opinion as to whether on the facts found and stated by the commissioners, their ruling was correct in law.

The *Brentford* case[1] was one in which the applicant taxpayers had appealed to the commissioners against certain assessments. When the matter came on for hearing an adjournment was sought for on behalf of the applicants but refused. The applicants moved for judicial review of the decision refusing the adjournment. In the High Court the Crown took the preliminary point that judicial review was inappropriate because a case stated which was already in train provided a remedy for the taxpayers' alleged injustice. Taylor J accepted the point and dismissed the application. In doing so the learned judge touched on s 56 of the English Taxes Management Act 1970 which provided for an appeal by case stated, gave the High Court wide powers by reference to sub-s (6) of that section and which in the judge's view enabled the court to review a refusal of the commissioners to exercise their discretion to adjourn appeals.

Nowhere in the *Brentford* case[1] could I find that the court held that the proper course for an appeal on procedural matters is by way of case stated as our special commissioners said in the case they stated to this court. In any event, with respect, it seems to me that the special commissioners fell into the common error of relying on an English decision for authority

without first ascertaining whether the law upon which that decision is based is the same as our law. Unfortunately as it turns out, the law is patently different, the English provisions empowering appeal by case stated in wide terms and ours confining appeal by case stated only against a deciding order as statutorily defined.

The special commissioners as stated above also relied on *Bye v Coren*.[2] I regret I found that case unhelpful inasmuch as there was no issue before the court as to jurisdiction.

In *Samuel Bruce v Burton*[3] the appellant was deemed properly assessed for tax which he paid. He then made an application to the commissioners for repayment of part thereof on certain grounds, the said repayment was claimed as to one amount under s 27 of the Finance Act 1896 and as to another amount under s 23 of the Customs and Inland Revenue Act 1890. The application was dismissed. The appellant being dissatisfied with the decision of the commissioners required them to state a case for the opinion of the High Court. The commissioners complied, the case stated being whether, assuming the commissioners did have jurisdiction to state the case, their determination was right in law. Before the High Court counsel for the respondent took a preliminary point, namely, that under the appeal sections of the legislation in question to wit the Taxes Management Act 1880 there had to be three steps, first an assessment, then an appeal to the commissioners and then a case stated. Counsel submitted that there was no assessment in question, that there was no appeal given to the commissioners and therefore there was no power given to state any case. The court accepted the preliminary objection and dismissed the appeal.

Again in *Furtado v The City of London Brewery Co Ltd*[4] where the appellant had made an application under s 134 of the Income Tax Act 1842 for repayment of tax already assessed, not appealed against and paid, the English Court of Appeal held likewise, agreeing with the dictum of Scrutton J at first instance which is as follows:

> Now the matter stands in this way on the statutes. The Taxes Management Act 1880, by s 59, provides that immediately upon the determination of any appeal under the Income Tax Acts by the general commissioners, the appellant or the surveyor may declare his dissatisfaction and require the commissioners to state a case which will set forth the facts and the determination of the commissioners. That is a right of appeal from the decision of the commissioners in matters of law given by statute, and it is immediately upon the determination of any appeal under the Income Tax Acts. In a proceeding which is not an appeal under the Income Tax Acts there is no power given by the statute to state a special case, and no appeal lies. The question, therefore, seems to be, is the proceeding which takes place under s 134 an appeal by the subject, the person taxed, to the general commissioners. If it is an appeal, the Taxes Management Act 1880, gives a right to appeal by special case.
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> Now, s 134 of the Act of 1842, and s 133 of the same Act, now repealed, both assumed an assessment properly made and not appealed against and standing, and provided that by reason of something which happened after the assessment the assessment might be amended, that is to say, that though it was right at the time it was made, some fact which has happened afterwards and which was not before the people who originally made it may give a right to have it amended with relief to the party charged. Accordingly, s 134 provided that, on the happening

of certain events during and before the end of the year for making such assessment, it shall be lawful for such person 'to make application to the Commissioners for General Purposes within three calendar months after the end of the year' and on due proof thereof to their satisfaction the said 'Commissioners shall cause the assessment to be amended'.

Now, if the matter stood there alone, and I had only s 134 and the Taxes Management Act, I should have thought that was not an appeal. It assumes that the assessment is properly made and it asks for relief by reason of something that has happened after the assessment in question. That, I should have thought, was not properly described as an appeal, but was properly described as an application for relief, and, not being properly described as an appeal, it would not come within the language of the Taxes Management Act of 1880 — an appeal under the Income Tax Acts.

Incidentally in the *Furtado* case[4] the Court of Appeal held that the rule of law is that although certiorari lies unless expressly taken away yet an appeal does not lie unless expressly governed by statute.

Counsel for the respondent in this case in the same way raised a preliminary objection saying that it was not competent for the commissioners to refer this matter to this court by way of case stated because the appellant's appeal was not expressly governed by the provisions of the Act. It was not against a deciding order made by the commissioners and that in fact the appeal before the commissioners is still pending. Accordingly the appellate provisions of the Act had to be examined.

The jurisdiction of this court to entertain an appeal from a decision of the commissioners can be found in para 34 of the 5th Sch of the Act, which reads as follows:

> Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to paragraph 26(b) or (c)) by requiring the Special Commissioners to state a case for the opinion of the High Court...

It will be seen at once that a party who is dissatisfied with an order made by the commissioners and requires them to state a case for the opinion of this court can only do so in the event of the commissioners making a deciding order and not before.

Paragraph 23 of the Schedule reads as follows:

> As soon as may be after completing the hearing of an appeal, the Special Commissioners shall give their decision on the appeal in the form of an order which shall be known as a deciding order and which, subject to this Schedule, shall be final.

Paragraph 39 of the Schedule reads as follows:

> The High Court shall hear and determine any question of law arising on a case stated under paragraph 34 and may in accordance with its determination thereof —
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> (a) order the assessment to which the case relates to be confirmed, discharged or amended;
> (b) remit the case to the Special Commissioners with the opinion of the court thereon; or
> (c) make such other order as it thinks just and appropriate.

Thus by reference to para 39 this court is required to hear and determine any question of law arising on a case stated under para 34. Looking at para 34 the appeal to this court is only possible if it is against a deciding order. In para 48 'deciding order' is said to mean a deciding order made under para 23 and by reference to para 23 a deciding order can only be made after the commissioners have completed the hearing of an appeal and given their decision on that appeal. None of those things has been done in this instance.

Pursuant to s 102(4) of the Act Sch 5 has effect for regulating the hearing and determination of the appeal to the commissioners and otherwise as provided therein. It will be seen that paras 22 and 45(a) of the said Schedule referred to in the case stated by the special commissioners to support their ruling appealed against relate to matters of procedure at the hearing. The paragraphs read as follows:

> 22 Subject to this Act and any rules made under section 154(1)(d), the Special Commissioners may regulate the procedure at the hearing of an appeal and their own procedure.
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> 45 Directions for the settlement or disposal of any matter of a procedural nature arising in connection with proceedings before the Special Commissioners, the High Court or the Federal Court under this Schedule may, if no other provision is made by or under this Act or rules of court for the settlement or disposal of the matter, be given —
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> (a) in relation to proceedings before the Special Commissioners, by one of the Special Commissioners on an application made in whatever manner he considers appropriate;

As stated in 37 *Halsbury's Laws of England* (4th Ed) para 10 there is a vital and essential distinction between substantive law and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. The function of practice and procedure is to provide the machinery or the manner in which legal rights or status and legal duties may be enforced or recognized by a court of law or other recognized or properly constituted tribunal. Whether the ruling of the special commissioners appealed against by way of this case stated is one based on substantive law or procedural law is to my mind irrelevant. It is only against a deciding order as statutorily defined that appeal lies.

Senior federal counsel arguing on behalf of the appellant against the preliminary point submitted that the order made by the commissioners was in itself a deciding order notwithstanding that it was made at an interlocutory stage. He submitted that this was so inasmuch as the order determined finally the rights of the parties on the issue then at hand, namely, the admissibility in evidence of the returns and assessments for the years outside the period of dispute.

By way of analogy federal counsel made reference to *PP v Raymond Chia Kim Chwee & Anor* and *Zainal bin Hj Ali v PP*[5] where at p 438 the Supreme Court held that the right of a person to ask for a document or other material in a criminal proceeding under s 51 of the Criminal Procedure Code (FMS

Cap 6) ('the Code') is a right exercisable at the discretion of the court. Thus a decision or order to issue a summons under s 51 of the Code was, so the court held, a final order in the sense that it was final in its effect and therefore appealable under s 307(1) of the Code. However it was there held further that such a decision or order is distinguishable from a purely 'procedural' ruling as described in *PP v Hoo Chang Chwen*[6] and *PP v RK Menon & Anor.*[7] In the former case Rose CJ of Singapore dealt with an appeal on the admissibility of certain statements and the learned judge held that the ruling of the magistrate was a procedural ruling and therefore not an appealable order. In the latter case Ajaib Singh J also took the view that a ruling on a point of law relating to non-compliance with s 129(1)(b) of the Code was a procedural and non-appealable ruling.

Section 307(1) of the Code provides generally for a party who is dissatisfied with any judgment, sentence or order pronounced by any magistrate's court to have a right of appeal to the High Court. I do not see that any analogy can be drawn from that section and the case law thereunder to support the appellant's case here.

The ruling by the special commissioners on the admissibility of the returns in question was similar to the ruling of the learned magistrate in *PP v Hoo Chang Chwen*[6] abovestated and as found by Rose CJ in that case would appear to be a procedural ruling. Consequently even if an analogy can be drawn from the situation under s 307(1) of the Code, the ruling is not an appealable order.

It is significant that in the same case Rose CJ said that to arrive at any other conclusion would seem to open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural and that the proper time to take such points should be upon appeal, after determination of the principal matter in the trial. Likewise the Privy Council case of *The Trustees' Corp (India) Ltd v The Commissioners of Income Tax, Bombay Presidency.*[8] In that case which was an appeal from a judgment of the High Court at Bombay, upon a reference made to that court by the Commissioners of Income Tax under s 66(2) of the Indian Income Tax Act 1922 Lord Blanesburgh in his speech confirmed the view of the Board that the High Court would be well advised to require before they seek to entertain any question under s 66 that the preliminary requirements of the section were strictly complied with, it being the intention of the enactment that the High Court is not to be flooded with such applications. It may well be that our own provisions limiting appeal by way of case stated to that against a deciding order as statutorily defined bear the same object, namely, of ensuring that this court is not inundated with applications such as the present.

Lastly it was submitted on behalf of the appellant that this court should grant the appellant relief by way of judicial review. I do not agree. The view I take is that the appellant should have awaited the completion of the hearing of the appeal by the special commissioners and their decision in the form of a deciding order as defined and then if dissatisfied with that order proceed by requiring the special commissioners to state a case for the opinion of this court. In any event there was no proper application for

judicial review. Ordinarily such application will need to meet all the requirements of O 53 of the Rules of the High Court 1980. What is more it is well-established law that judicial review should not ordinarily be granted where an alternative remedy is available by way of appeal procedures expressly provided by tax legislation. It should not be allowed to supplant the normal statutory appeal procedure. See *R v Inland Revenue Commissioners, ex p Preston*[9] per Lord Templeman at p 862.

The appeal is accordingly dismissed with costs to be taxed.

Appeal dismissed.

Reported by Wong Kian Kheong